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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

No. 84-1698 (4)

RANSOM THEODORE SPURLOCK, et al.,
Petitioners,

v.

SANTA FE PACIFIC RAILROAD COMPANY and
KERR-McGEE CORPORATION,
Respondents.

APPENDICES TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA

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APPENDIX A

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

NO. CIV 80-601 PCT/VAC

RANSOM THEODORE SPURLOCK, VERNIE MARIA SPURLOCK, CHARLES PATRICK SPURLOCK and NANCY JENEEN SPURLOCK,

Plaintiffs,

v.

SANTA FE PACIFIC RAIL ROAD COMPANY and KERR-McGEE CORPORATION,

Defendants.

MOTION FOR REMAND AND RESPONSE IN OPPOSITION TO PETITION FOR REMOVAL

(Oral Argument Requested)

COME NOW the plaintiffs, by and through their attorney, Jack E. Evans, and

respectfully file this, their Motion for Remand and Response in Opposition to Petition for Removal, and urge this Court to remand this matter to the Superior Court of Arizona in and for the County of Apache pursuant to 28 USC §1447(c). This Motion for Remand and Response in Opposition to Petition for Removal is supported by the accompanying Memorandum of Points and Authorities.

Respectfully submitted this 28th day of July, 1980.

JACK E. EVANS, LTD.

By_____

Jack E. Evans
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MEMORANDUM OF POINTS AND AUTHORITIES

1. Introduction

This lawsuit was commenced on April 30, 1973, by the plaintiffs filing a Complaint in the Apache County Superior Court. A copy of this Complaint is attached hereto marked Exhibit A and by this reference incorporated herein. This Complaint sought relief against Santa Fe Pacific Railroad Company, a Kansas corporation, and Kerr-McGee Corporation, a Delaware corporation. The relief requested was in three counts. First, the Spurlocks sought to quiet title to the helium located underneath their ranch located in Apache County, Arizona. Second, the plaintiffs sought to recover damages on account of the defendants' past and continuing conversion of the helium. Third, the plaintiffs sought to recover damages on account of the loss of

speculative value to the lawsuit land on account of the defendants' exploration. On May 17, 1973, Santa Fe answered the Complaint admitting that it was a Kansas corporation doing business in Arizona. Thereafter, Santa Fe filed an Amended Answer alleging that it was not a Kansas corporation but was, instead, a corporation duly incorporated by Act of Congress approved March 3, 1897. Since both the plaintiffs and the defendant had erroneously characterized Santa Fe as a Kansas corporation, rather than a federally chartered corporation, the plaintiffs filed an Amended Complaint to correct this error.

After some initial discovery was concluded, the plaintiffs filed their Third Amended Complaint on February 28, 1975. A copy of this Third Amended Complaint is attached hereto marked

Exhibit B and by this reference incorporated herein.

As the Court can see from a review of the Third Amended Complaint, it adds several new theories of recovery, although the lawsuit remained basically one seeking to quiet title to the helium and to recover damages on account of the defendants' past and continuing injury to the plaintiffs. More specifically, Count Two of the Third Amended Complaint remained an action seeking to recover damages on account of the defendants' conversion. Additional allegations, however, were added to Count Two. These additional allegations specifically stated that Santa Fe was a corporation organized by a special Act of Congress of the United States, a copy of which was attached to the Third Amended Complaint, and had succeeded to the rights, powers and

purposes of the Atlantic and Pacific Railroad Company, which corporation was formed pursuant to an 1866 Act of Congress of the United States, a copy of which Act was also attached as an exhibit to the Third Amended Complaint. These additional allegations contained in Count Two of the Third Amended Complaint went on to state that the defendants knew that the sole power and purpose of the defendant Santa Fe was to construct and operate a railroad and telegraph line, and that said purposes and powers were further limited by the Constitution and laws of the State of Arizona; further, that the defendants knew that Santa Fe was originally given the lands which are the subject matter of the lawsuit by the Congress of the United States to aid in the construction of a railroad across Apache County; further, that the defendants knew that said lands

were only to be sold by Santa Fe with the proceeds therefrom to be applied solely to the construction of said railroad; further, that the defendants knew that the purchasers of the lawsuit land from Santa Fe were to acquire all of Santa Fe's right, title and interest in and to the said lands; further, that Santa Fe represented to the United States of America that said lands were "non-mineral" in order to obtain title thereto and that the United States of America gave the lands to Santa Fe upon the express representation by Santa Fe that the lands did not contain minerals; further, that Santa Fe, pursuant to the 1866 Act of Congress, is only authorized to own lands necessary or proper for the construction of a railroad and for turn-outs, standing places for cars, depots and station houses, and that Santa Fe is expressly without the

authority to speculate in, deal in, lease, hold, enter upon, prospect for, drill for, explore for oil, gas, coal, minerals or other substances or other interests in land, and that the defendant Santa Fe and the other defendants knew that Santa Fe was without the right to assert any right, title, interest or claim in and to the land owned by the Spurlocks and that by doing so the same violated the congressional purpose in granting said lands to Santa Fe and was beyond its corporate power and purposes and that Santa Fe had not complied with the laws of the State of Arizona in that it failed to qualify the corporation to do business in the State of Arizona and had so failed at the time it reserved unto itself or attempted to reserve unto itself the interest in the lawsuit lands. There were further allegations added to the Third Amended Complaint

relating to the payment of taxes and other matters.

Both the defendant Santa Fe and the defendant Kerr-McGee were served with copies of this Third Amended Complaint and responded thereto. Thereafter, additional discovery was had in this Superior Court action and the defendant Santa Fe filed a series of Motions for Partial Summary Judgment. The first such motion was filed on July 26, 1979, a copy of which is attached hereto marked Exhibit C and by this reference incorporated herein, and dealt with the plaintiffs' claim of failure to qualify to do business in Arizona. The second Motion for Partial Summary Judgment was filed on August 9, 1979, a copy of which is attached hereto marked Exhibit D and by this reference incorporated herein, and dealt with the plaintiffs' claim of de facto dissolution

of Santa Fe Pacific. The third Motion for Partial Summary Judgment was filed on August 10, 1979, a copy of which is attached hereto as Exhibit E and by this reference incorporated herein, and specifically dealt with the plaintiffs' claims set forth in paragraph VII of Count II of the Third Amended Complaint relating to the congressional acts under which Santa Fe and its predecessor were chartered. Each of these Motions for Partial Summary Judgment were argued and denied by the Court (see minute entry of Paul G. Rosenblatt, Judge of the Superior Court, dated June 27, 1980).

On August 1, 1979, the plaintiffs filed their Motion to File Fourth Amended Complaint and to Add Additional Party Defendants, a copy of which is attached hereto marked Exhibit F and by this reference incorporated herein. This Motion to

File the Fourth Amended Complaint sought to change three things. First, it sought to delete certain parties from the lawsuit. Second, it sought to join as an additional party defendant Santa Fe Industries, Inc. Third, it sought to increase the prayer for punitive damages from $5 million to $50 million. As is stated in the motion, Santa Fe Industries, Inc. was sought to be brought into the lawsuit because it is the alter ego of Santa Fe Pacific Railroad Company and it received from Santa Fe Pacific Railroad Company, without consideration, over $20 million in cash plus other property which belonged to Santa Fe Pacific Railroad Company. The plaintiffs pointed out in their motion that such a transfer would allow the plaintiffs to sue Santa Fe Industries, Inc. as the recipient of fraudulently conveyed property pursuant to

the Arizona Fraudulent Conveyance Act, A.R.S. §44-1010. After Judge Rosenblatt granted this Motion to Amend, the defendants, Santa Fe Pacific Railroad Company and Kerr-McGee Corporation, were served with copies of the Fourth Amended Complaint. Santa Fe Industries, Inc. has not yet been served.

After more than seven years of discovery and motions, and the filing of thousands of papers into Court, this lawsuit was scheduled for a pretrial conference on July 29, 1980, and for trial, to a jury, in St. Johns, Arizona, on September 15, 1980. On the eve of trial, the defendants, Santa Fe Pacific Railroad Company and Kerr-McGee Corporation, filed a Petition for Removal to the United States District Court for the District of Arizona. This petition is based upon an allegation that this Court

has original jurisdiction under the provisions of 28 USC §1331, in that it is an action arising under the Constitution, laws or treaties of the United States and in an amount in excess of $10,000. The removal petition was improperly filed and this matter should be remanded to the Superior Court.

There are several reasons why this Court should remand this action. First, reference to federal laws in the Fourth Amended Complaint is merely incidental and collateral to the main controversy which centers around a quiet title lawsuit. Second, the removal petition was not timely filed. It should have been filed, if at all, within 30 days after the pleadings containing the alleged basis for removal were served on the defendants. Third, the removal petition was not verified as is required by law.

2. Reference to Federal Laws in the Fourth Amended Complaint is Merely Incidental and Collateral to the Main Controversy

As the Court can see from a review of the pleadings on file in this case, the plaintiffs are seeking to quiet title to the helium which is located underneath their land. The plaintiffs are also seeking damages under various theories, including conversion and loss of speculative value. Under these circumstances, mere reference to federal laws should not invoke federal question jurisdiction and this matter should be immediately remanded. A similar result was reached in Ashley v. Southwestern Bell Tel. Co., 410 F.Supp. 1389 (W.D. Tex. 1976). There, the plaintiffs sued to recover damages arising out of an alleged invasion of privacy. In their lawsuit, the plaintiffs alleged an invasion of their "constitutional,

contractual and inalienable rights of privacy" and that the defendant had been in violation of "the law, State, Federal, and Regulatory, as well as the rules of the Defendants." The Federal District Court remanded the case to state court although reference was made in the pleadings to federal statutes. The court thoroughly reviewed the law on the subject including the leading case of Gully v. First Nat. Bank of Meridian, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70 (1936):

> The Supreme Court stated in that opinion that for a suit to be removable 1) a right or immunity created by the Constitution or laws of the United States must be an essential element of the plaintiff's cause of action; 2) the right or immunity must

be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another; 3) a genuine and present controversy, not merely a possible or conjectural one, must exist as to such right or immunity; 4) the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal; and 5) the complaint must be confined to a statement of plaintiff's cause of action without anticipation of any probable defense. These principles have remained the law of removal

since Gully and have only been elaborated upon in subsequent cases.

Applying the law to the facts, the District Court held that the case should be remanded because the issue of a federal law was merely incidental or collateral to the main controversy:

> Although the court's role is to pierce the veil of plaintiff's complaint, plaintiff is still the master of his own complaint as to what law he will rely upon, The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 33 S.Ct. 410, 57 L.Ed. 716 (1912), and absent fraudulent concealment of a federal claim, he has the right to choose by the allegations of

his complaint the removability of his case. Crow v. Wyoming Timber Products Co., 424 F.2d 93, 95 (10th Cir. 1970). Removal is always proper where the real nature of the claim asserted in the complaint is federal, but where plaintiff has a choice of relying on state law and does so rely, there can be no removal except on the basis of diversity. City of Galveston v. Int'l. Organization of Masters, Mates and Pilots, 338 F.Supp. 907, 909 (S.D. Tex. 1972).

Removal Statutes should be given strict construction, because the congressional policy is to limit removal

out of regard for the rightful independence of state governments. See, La Chemise Lacoste v. Alligator Co., Inc., 506 F.2d 339 (3rd Cir. 1974) cert. den. 421 U.S. 937, 95 S.Ct. 1666, 44 L.Ed.2d 94 (1975). Thus, mere reference to the Federal Constitution, laws or treaties are not adequate to disclose a federal question, instead the pleadings must spell out a claim integrated with a Federal statute or the Constitution. Chambers-Liberty Counties Nav. Dist. v. Parker Bros. & Co., 263 F.Supp. 602 (S.D. Tex. 1967), McCartney v. State of West Virginia, 156 F.2d 739 (4th

Cir. 1946). Also, a federal question merely incidental or collateral to the main controversy is not sufficient to serve as a basis for removal jurisdiction. Armstrong v. Alliance Trust Co., 126 F.2d 164, 167 (5th Cir. 1942).

Simply stated, the Spurlock v. Santa Fe lawsuit involves the ownership of the helium which lies beneath the plaintiffs' land and whether or not the defendants should respond in damages to the plaintiffs for their past and continuing wrongs. The fact that the defendant Santa Fe Pacific Railroad Company is federally chartered and, along with other defendants, has violated its federal charter in many regards, is only collateral and incidental to the main controversy.

Indeed, Santa Fe Pacific Railroad Company, being a federally chartered corporation, is deemed to be a citizen of every state for the purposes of diversity jurisdiction. To take this case away from the state court because Santa Fe Pacific Railroad Company is federally chartered and has violated the laws creating it, would be an extreme case of the "tail wagging the dog."

3. The Petition for Removal Was Not Timely Filed and This Case Should Be Immediately Remanded to the Superior Court of Arizona

Santa Fe and Kerr-McGee cannot just remove this complicated lawsuit to federal court any time they wish. Because this lawsuit is currently based upon an amended pleading, Santa Fe and Kerr-McGee may only remove within 30 days after they were served with the amended pleading containing the alleged basis for federal

jurisdiction. 28 USC §1446(b) provides, in pertinent part, that:

> if the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

As was pointed out above, the allegations concerning violation of Santa Fe's charter and the laws creating the federal corporation were alleged in the Third Amended Complaint which was filed in the Superior Court of Apache County,

Arizona, on February 28, 1975. (See pages 7 and 8 of Third Amended Complaint attached hereto as Exhibit B.) A comparison of this allegation contained in Count Two of the Third Amended Complaint to the same allegation contained in Count Two of the Fourth Amended Complaint reveals that the words "and affiliated defendant" were added to the Fourth Amended Complaint nine times. No other changes were made in this allegation from the Third Amended Complaint to the Fourth Amended Complaint. If Santa Fe and Kerr-McGee wanted to remove this case to federal court, they should have done so within 30 days of being served with the Third Amended Complaint over five years ago. The effect of a late petition for removal is discussed in 14 Wright & Miller, Federal Practice and Procedure §3732, at 727-730 (1976):

The statute specified that this supplementary period for petitioning for removal is available only when "it may be first ascertained that the case [not previously removable] is one which has become removable." Thus an amendment of the complaint will not revive the period for removal if the case previously was removable but defendant failed to exercise his right to do so. A different result is reached, however, if the amendment provides a new basis for removal or changes the character of the litigation so as to make it substantially a new suit, since a willingness to remain in a state court to

litigate a particular claim should not be interpreted as a willingness to remain in a state court to adjudicate a different claim.

These principles are illustrated in Adams v. Western Steel Buildings, Inc. In that case, defendants filed a third-party complaint against federal agents for breach of warranty. The agents arguably could have removed this claim under Section 1442(a)(1) of Title 28, but they failed to do so. Seven months after filing their original third-party complaint, defendants filed an amended third-party complaint alleging negligence. Sixteen

days later the agents filed a petition for removal. In granting the motion to remand Chief Judge Arraj noted that "the mere fact of some alteration in the claims stated is insufficient to support new attempts at removal. If the action could have been removed initially but was not, an amendment of the claim does not generally revive the right of removal." He conceded that "a sufficiently substantial change in the nature of the action may reafford the opportunity" to remove; "the question is whether the alteration has 'so changed the character of the litigation as to make it substantially a new

suit begun that day.'"

* * * *

> The time limitations in Section 1446 are mandatory and must be strictly construed in accordance with the computation principles in Federal Rule of Civil Procedure 6. They will not be extended by continuances, demurrers, motions to set aside service of process, pleas in abatement, stipulations, or court orders,...

The Petition for Removal is five years too late. This matter is set for a pretrial conference on July 29, 1980. The trial of this matter which will undoubtedly last for weeks has been scheduled, for the convenience of all the parties, witnesses and the Court, for September 15,

1980. No further delay should be caused by the defendants' improper removal. This case should immediately be remanded to state court.

4. The Petition for Removal Was Not Verified As Is Required by Law

28 USC §1446(a) requires a petition for removal to be verified. Although the lack of verification of a removal petition is not fatal, it should be cured within a reasonable period of time. Nelson v. Peter Kiewit Sons' Co., 130 F.Supp. 59 (D.N.J. 1955). Such an amendment should be filed within the 30-day period for seeking removal. Cf. Luehrs v. Utah Home Fire Insurance Co., 450 F.2d 452 (9th Cir. 1971). Given the improper and erroneous circumstances alleged in the Petition for Removal, however, the defendants Santa Fe and Kerr-McGee in this particular case may not dare to file an

affidavit with their removal petition.

5. The Plaintiffs are Entitled to Their Costs Incurred in Bringing This Motion for Remand, Including Reasonable Attorneys' Fees

The Petition for Removal which has been filed by Santa Fe and Kerr-McGee is poorly taken. This case must be remanded to the Superior Court and the Spurlocks are entitled to an order assessing Santa Fe and Kerr-McGee and their surety on the removal bond, Aetna Casualty and Surety Company, for "all costs and disbursements incurred by reason of the removal proceeding."

Such "costs and disbursements" would include the attorneys' fees necessitated by this Petition for Removal. Eaddy v. Little, 234 F.Supp. 377, 380 (E.D. S.C. 1974) ("Terms and conditions are not limited to taxable costs but may include compensation for all the expenses to which

the defendant has been put including attorneys' fees...") See also the discussion in 14 Wright and Miller, Federal Practice and Procedure §3739, at 764-765.

6. Conclusion

Based upon the foregoing, it is respectfully submitted that this Court forthwith remand this case to the Superior Court of Arizona in and for the County of Apache.

Respectfully submitted this 28th day of July, 1980.

JACK E. EVANS, LTD.

By /s/
Jack E. Evans
1000 Del Webb Building
3800 North Central Avenue
Phoenix, Arizona 85012
Attorneys for Plaintiffs
Spurlock

Copy of the foregoing hand
delivered this 28th day of
July, 1980, to:

Silas H. Shultz, Esq.
Donald R. Gilbert, Esq.
Timothy Berg, Esq.
Fennemore, Craig, von Ammon & Udall, P.C.
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363 North First Avenue
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Attorneys for Defendant Kerr-McGee
Corporation

/s/_____

Copy of the foregoing mailed
this 28th day of July, 1980, to:

The Honorable Paul G. Rosenblatt
Yavapai County Superior Court
Prescott, Arizona 86301

John T. Crosby, Clerk
Apache County Superior Court
St. Johns, Arizona 85936

/s/_____

APPENDIX B

March 13, 1984

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Re: 1 CA-CIV 6938, Spurlock, et al. v. Santa Fe Pacific Railroad and Kerr-McGee Corporation

Gentlemen:

This letter is in response to Mr. Evans' letters of February 29, 1984 and March 4, 1984, Mr. von Ammon's letter of March 2, 1984, and Mr. Palmer's letter of March 2, 1984. First, let me state that I appreciate having this matter called to my attention. In my opinion Mr. Evans would not have fulfilled his obligations and duties to this court had he not forthrightly and promptly called this matter to my attention at this early stage in the appeal proceedings. When Chief Judge

Jacobson assigned me to the panel which was to consider and dispose of this appeal, I did remember that during the early 1960's I had represented the receiver for Apache Oil and Helium Corporation, and that the primary assets of the corporation were net profit interests derived from leases relating to helium. Prior to receiving Mr. Evans' letter of February 29, 1984, I did not recall any instance in which I was required to render an opinion, or even to consider, the meaning of the granting clauses of any helium leases involved in the receivership proceedings. Additionally, I did not recall any instance in which the receiver and any of the parties to the pending appeal might have been actively involved in an adversarial confrontation. The name "Spurlock" did ring a bell, and I assumed that I might have seen the name in some of the documentation involved in the receivership proceedings.

After receiving Mr. Evans' letters, I have given the matter considerable additional thought. I have spent several hours reviewing all of the records retained by Evans, Kitchel & Jenckes relating to my representation during the 1960-63 period. These records do not reveal any instance of the receiver, or myself as the attorney for the receiver, being involved in any questions relating in any way to the interpretation of the granting clauses of the leases which formed the basis for the retained net profit interests of Apache Oil and Helium Corporation.

It must be kept in mind that the receiver of Apache Oil and Helium

Corporation functioned primarily as a "caretaker" attempting to sort out the various stockholder conflicts relating to Apache Oil and Helium Corporation. The receivership terminated when the various stockholder groups were able to work out a settlement of their interests.

Insofar as concerns the federal court litigation referred to in Mr. Evans' letters, I did not have any independent recollection of that litigation. From a review of the receiver's final report, and from a review of the retained files of Evans, Kitchel & Jenckes, it is evident that during my representation the receiver took no part in that litigation. Therefore, to the best of my knowledge, I have had no occasion to review or even consider the interrogatories or other documentation involved in that litigation. Of course, as attorney for the receiver I did have some contact with Kerr-McGee officials and attorneys relating to the net profits agreement, but these contacts were minimal, and I do not recall any confrontations or other dealings which would suggest that I should disqualify myself because of these contacts.

In summary, initially I had no recollection of any participation in the receivership proceedings which would suggest that I disqualify myself in the pending appeal. My subsequent review of the retained Evans, Kitchel & Jenckes files did not reflect any possibility that I was involved in any representation which would justify disqualification. Additionally, after having reviewed all of the above-mentioned files, I have seen nothing which would serve to "jog" my memory as to

any representation which would suggest disqualification. I have referred counsel's correspondence relating to this matter to the other judges on this panel, Judges Eubank and Meyerson, as well as to Chief Judge Jacobson. Based upon their review of the correspondence, as well as my discussion with them concerning the matters set forth in this letter, they have advised me that they see nothing which would justify or warrant my disqualifying myself for the pending appeal. Accordingly, I have decided that I will continue to participate in the consideration and disposition of the appeal. Again, I appreciate having this matter called to my attention in order that it might be considered and objectively evaluated prior to my having invested the substantial amounts of time which will be required to consider and determine the issues raised in this appeal.

Sincerely yours,

L. Ray Haire

LRH/hm
c: Chief Judge Jacobson
Judge Eubank
Judge Meyerson
Clerk's Office (w/enclosures)

APPENDIX C

February 29, 1984

The Honorable Ray Haire
Arizona Court of Appeals
First Floor, South West Wing
State Capitol
Phoenix, Arizona 85007

RE: Ransom Theodore Spurlock, et ux., et al., v. Santa Fe Pacific Railroad, a corporation; and Kerr-McGee Corporation, a Delaware corporation,
1 CA-CIV 6938

Dear Judge Haire:

The above referenced case was assigned to your department by an order dated February 15, 1984. For the reasons hereinafter stated you may desire to recuse yourself because of your involvement as a practicing lawyer in another case during the early 1960's. By writing this letter and calling certain matters to your attention I am not suggesting that you would be biased for or against either party in this case. However, it is probable that you have forgotten your involvement in the prior case due to the passage of over 20 years. As you become more deeply involved in an analysis of this case it is probable that your prior involvement will be recalled. Assuming that your prior involvement were to be the triggering mechanism for your withdrawal, it obviously serves the interest of the Court and the parties to have your withdrawal occur now rather than later.

To refresh your recollection I will briefly discuss your association with the prior case and how it is related to this case.

On February 17, 1960, the Maricopa County Superior Court entered an order authorizing Marvin Dennis, Receiver for Apache Oil and Helium Corporation, to employ the firm of Evans, Kitchell & Jenckes as the receiver's counsel in David Halliburton, et al., Plaintiffs, v. Apache Oil & Helium Corporation, an Arizona corporation, et al., Defendants, No. 106659. You, as a member of that firm, then entered an appearance as the receiver's attorney. You thereafter continued to represent the receiver for a period of almost three years. On December 7, 1962 the receiver filed his notice of final account. On January 15, 1963 the Court entered an order approving the final account including, inter alia, authorization to pay a final fee to Evans, Kitchell & Jenckes of $3800.00. Attached are copies of the final account and order for your convenience.

The receiver had been appointed to conserve the assets of Apache. The sole asset of Apache was its interest under an agreement with Kerr-McGee Oil Corporation. A copy of that agreement, which was attached to the receiver's final account, is enclosed. The Apache agreement with Kerr-McGee was based upon certain leases on land located near Navajo, Arizona. One of the leases was on the Spurlock family ranch. Apache had acquired the leases pursuant to the terms of a Commitment Agreement with Arizona Gas and Chemical Corporation, a copy of which is attached

to the Answer of H. Marvin Dennis, as Receiver, to Writ of Garnishment, which was signed by you as attorney for the receiver. A copy of the Answer and Commitment Agreement are attached.

In your capacity as attorney for the receiver you became involved in a Federal District Court case entitled D. A. McGee, Kerr-McGee Oil Industries, Inc., a corporation, and Martin T. Bennett, Plaintiffs, v. Apache Oil and Helium Corporation, a corporation, et al., Defendants, No. CIV 3820-Phx. which was an action to foreclose on Apache's only asset, its interest under the agreement with Kerr-McGee. Certain pleadings and exhibits in that case were important exhibits in this case.

Most of the exhibits and documents which were involved in the Apache receivership case were also exhibits in this case. Attached is a partial listing of exhibits, in evidence, in this case which were also involved in the receivership case. Due to the length and extent of your involvement in the Apache case it appears there may have been more exhibits and documents which were common to the two cases.

Without discussing all of the issues in this case it is sufficient to note that the ownership and right to the proceeds from helium on the Spurlock ranch is one of the fundamental issues in this case. The determination of that ownership was based, in part, upon the meaning of the terms, "oil and gas", and "oil and gas and minerals", and similar terms. Extensive evidence of the custom and usage of

those terms was introduced during the trial. A substantial portion of that evidence consisted of documents which were involved in the Apache receivership.

Based upon a preliminary examination of the court records in the Apache receivership case it is possible that you were required to form and render opinions as to the meaning of the foregoing terms and perhaps the ownership of the helium and the right to the proceeds therefrom. Thus, upon reflection, you may conclude that positions and/or opinions which you expressed in your capacity as a practicing attorney are the same opinions you will be called upon to express in this case.

It is obviously difficult to compose a letter wherein recusal is discussed without the contents thereof suggesting that recusal is appropriate. However, I am merely calling to your attention matters which you considered almost a quarter of a century ago which you have probably forgotten. You will probably recall those matters as you delve into this case. Thus, if you believe recusal is appropriate, I am offering you the opportunity to consider the same now as opposed to later.

Very truly yours,

JACK E. EVANS, LTD.

_____

Jack E. Evans

cc: Mr. Philip E. von Ammon
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Mr. Robert L. Palmer
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Phoenix, Arizona 85004

APPENDIX D

March 4, 1984

The Honorable Ray Haire
Arizona Court of Appeals
First Floor, South West Wing
State Capitol
Phoenix, Arizona 85007

Re: Ransom Theodore Spurlock, et ux., et al., v. Santa Fe Pacific Railroad, a corporation; and Kerr-McGee Corporation, a Delaware corporation,
1 CA-CIV 6938

Dear Judge Haire:

My letter to you of February 29, 1984 was intended to accomplish the purpose stated therein, to wit: To assist you in recalling your involvement as a practicing attorney in litigation which occurred over 20 years ago, which litigation included a portion of the Spurlock family ranch and involved a large number of documents which are exhibits in this case. Contrary to Mr. von Ammon's and Mr. Palmer's letters, my letter was not a "transparent attempt at judge shopping", but was an attempt to avoid the inevitable delay which would ensue if, upon discovery of the relevancy of the prior proceedings, you then elected to recuse yourself. It is impossible for Mr. von Ammon, Mr. Palmer, or me to determine the full extent of your involvement in the prior proceedings. Thus, the suggestion of recusal was expressly negated in my letter. I merely discharged the duty which I have to you and the Court which was to inform you of

the matter. It ill behooves counsel to attempt to convert an obvious effort to inform the Court into an unethical and improper act. Assuming that either Mr. von Ammon or Mr. Palmer had been aware of your prior involvement I would have considered it highly improper for them to have failed to act as I acted.

Mr. von Ammon's letter is incorrect in several particulars. I assume those errors arise from the fact that Mr. von Ammon was not involved in the trial of the case and he is therefore unfamiliar with the facts. There is a direct relationship between the legal affairs of Apache and this case. Otherwise, all of the Apache legal documents would have been inadmissible in this case. Some of the more important Apache documents and their significance to this case are:

1. Pltf.Ex. 124: Amendment to Oil and Gas Lease dated August 20, 1956 between Spurlock & Wetzler as lessors and Apache as lessee wherein the Spurlock Oil and Gas Lease, which had been assigned by Apache to Kerr-McGee, was amended to include helium. A copy of that document is enclosed. Apache's, Kerr-McGee's and the Spurlocks' positions were clear, to wit: Oil and gas did not include helium thereby necessitating an amendment of the oil and gas lease to include helium.

2. Pltf. Ex. 113: Letter Agreement between Kerr-McGee and Apache dated August 1, 1956 wherein a distinction is drawn between "oil, gas, and minerals" and helium by using the terms independently and not inclusively. A copy of that document is enclosed.

3. Pltf. Ex. 127: Assignment of Oil and Gas Leases from Apache to Kerr-McGee dated August 22, 1956 wherein Apache expressly warrants that the leases include helium as well as oil and gas, but which assignment was preceded by Apache obtaining amendments to all of the leases to include helium.

4. Pltf. Ex. 87: Commitment Agreement between Apache and Arizona Gas dated May 25, 1955 wherein separate provisions are contained for drilling helium wells on the one hand and gas wells on the other hand.

Mr. von Ammon states that the matters involving Apache were not on land, the title to which is at issue in this case. However, the same was on the Spurlock family ranch and adjacent to the land involved in this lawsuit. Moreover, all of the parties in this lawsuit were involved in the land in which Apache was involved. Thus, Kerr-McGee, Atchison Topeka and Santa Fe, and the Spurlocks were all involved and were parties to the leases on the land in which Apache had an interest. The documents they executed on that land and the language they employed in those documents were powerful and persuasive evidence of their understanding regarding whether the terms "oil and gas" or "oil, gas and minerals" included "helium".

The interrogatories which were filed in D. A. McGee, Kerr-McGee Oil Industries, Inc., et al., vs. Apache Oil and Helium Corporation are dated in 1964. However, it is the answers thereto, not the interrogatories, which became relevant

in this lawsuit. Those answers related to many of the documents which were exhibits while you were representing the receiver.

Mr. von Ammon's characterization of my letter as an attempt to disqualify a judge merely because the judge was involved in a particular area of the law in his private practice is incorrect. I regard you as having outstanding expertise in the real property field and would consider myself fortunate to have your recognized expertise in that field applied to the facts and legal principles of this case. However, my letter was not written because of your prior involvement in the real property field. The helium deposits at Navajo, Arizona are sui generis. Those persons who have dealt with them have regarded them as one of a kind. Thus, it is the particular facts of this case and not your prior involvement in the real property field that prompted me to write you. You have been involved in a legal and factual situation involving helium deposits on the same ranch that is involved in this lawsuit and your involvement extended to many of the same documents and parties that are involved in this lawsuit.

The purpose of discussing the foregoing is not to encourage you to recuse yourself. Instead, the purpose is the same as my original letter, to wit: To inform you of matters which I assume will come to your attention as you devote time and attention to this case. If those matters would cause you to recuse yourself then I trust that Mr. von Ammon and Mr. Palmer would agree with me that you would prefer to recuse yourself now rather than

after you have expended significant time on the case.

Very truly yours,

JACK E. EVANS, LTD.

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Jack E. Evans

JEE:ed

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